MOTION FILED
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No. 92-1546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,
v.
JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF JOHN G. ORDWAY, JR. AND MARGARET M. ORDWAY IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, John G. Ordway, Jr. and Margaret M. Ordway hereby move for leave to file the attached brief *amicus curiae* submitted in support of the Petition for Certiorari. Consent for filing this motion was given by Petitioner and was lodged by it with the Clerk. Consent was requested of Respondents but was refused.

John G. Ordway, Jr. is the brother of the late Sally Ordway Irvine, for whom Respondents are the personal representatives. Like his sister, Mr. Ordway was the beneficiary of a trust established in 1917 by their grandfather, Lucius P. Ordway. Like Mrs. Irvine as well, upon the trust's termination in 1979, Mr. Ordway validly disclaimed

a portion of his interest in the trust corpus in accordance with state law. On their gift tax returns for the appropriate periods, Mrs. Irvine and Mr. Ordway each took the position that their disclaimers were not subject to federal gift tax because 1) the disclaimers were valid under state law, and 2) federal regulations imposing a gift tax on otherwise valid disclaimers could not be applied where the interest disclaimed had been created by a transfer in trust made prior to enactment of the Gift Tax Act in 1932. Petitioner United States of America, acting through the Internal Revenue Service, disagreed, and litigation ensued.[1]

After prevailing in the district court, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed, holding that the disclaimer was subject to federal gift tax. *See Ordway v. United States,* 908 F.2d 890 (11th Cir. 1990), *cert. denied,* 111 S. Ct. 2916 (1991). The facts in the *Ordway* and *Irvine* cases are "virtually identical" (Pet. App. 17a); the decision of the Eleventh Circuit in the Ordways' case "directly conflicts" with the decision in this case, as Petitioner correctly observes.[2]

The *Ordway* case, on remand from the Eleventh Circuit, remains pending in the United States District Court for the Southern District of Florida for the resolution of certain disputed valuation issues. *See Ordway v. United States,* No. 87-8187 (S.D. Fla.). As such, it would be governed by a decision of this Court in the *Irvine* case, as would *Johnson v. United States,* No. 89-8192 (S.D. Fla. filed Apr. 27, 1989), cited (Pet. 20) by Petitioner.

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[1] Margaret M. Ordway, Mr. Ordway's wife, consented to being deemed to have made one-half of her husband's alleged gift. *See* 26 U.S.C. § 2513.

[2] Every judge participating in the Eighth Circuit's *en banc* decision in *Irvine* wrote or joined an opinion expressly acknowledging this direct conflict. *See* Pet. App. 7a-10a; 12a; 17a.

See James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991).

Mr. and Mrs. Ordway thus have a direct and substantial interest in this Court's disposition of both the Petition for Certiorari and the case on the merits. Mr. and Mrs. Ordway, moreover, bring to this Court arguments made by neither Petitioner nor Respondents. While they support the *Irvine* decision, for example, unlike Respondents they believe that its conflict with the *Ordway* decision generates important and recurring issues that this Court should resolve. And while they support the Petition for Certiorari, they are not bound to the view that *Irvine* was wrongly decided and advance arguments not made by Petitioner. Mr. and Mrs. Ordway thus believe that their brief *amicus curiae* presents arguments that would assist the Court in ruling on the Petition for Certiorari, and request that their motion be granted.

Respectfully submitted,

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April 22, 1993

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BRIEF *AMICUS CURIAE* OF JOHN G. ORDWAY, JR. AND MARGARET M. ORDWAY IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST

John G. Ordway, Jr. is the brother of the late Sally Ordway Irvine, for whom Respondents are the personal representatives. Like his sister, Mr. Ordway was the beneficiary of a trust established in 1917 by their grandfather, Lucius P. Ordway. Like Mrs. Irvine as well, upon the trust's termination in 1979, Mr. Ordway validly disclaimed a portion of his interest in the trust corpus in accordance with state law. On their gift tax returns for the appropriate periods, Mrs. Irvine and Mr. Ordway each took the position that their disclaimers were not subject

to federal gift tax because 1) the disclaimers were valid under state law, and 2) federal regulations imposing a gift tax on otherwise valid disclaimers could not be applied where the interest disclaimed had been created by a transfer in trust made prior to enactment of the Gift Tax Act in 1932. Petitioner United States of America, acting through the Internal Revenue Service, disagreed, and litigation ensued.[1]

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The *Ordway* case, on remand from the Eleventh Circuit, remains pending in the United States District Court for the Southern District of Florida for the resolution of certain disputed valuation issues. *See Ordway v. United States*, No. 87-8187 (S.D. Fla.). As such, it would be governed by a decision of this Court in the *Irvine* case, as would *Johnson v. United States*, No. 89-8192 (S.D. Fla. filed Apr. 27, 1989), cited (Pet. 20) by Petitioner. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). Mr. and Mrs. Ordway thus have a direct and substantial interest in this Court's disposition of both the Petition for Certiorari and the case on the merits.

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[1] Margaret M. Ordway, Mr. Ordway's wife, consented to being deemed to have made one-half of her husband's alleged gift. *See* 26 U.S.C. § 2513.

[2] Every judge participating in the Eighth Circuit's *en banc* decision in *Irvine* wrote or joined an opinion expressly acknowledging this direct conflict. *See* Pet. App. 7a-10a; 12a; 17a.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Eleventh Circuit in *Ordway* and the Eighth Circuit in *Irvine* create an irreconcilable conflict as to rules properly governing estate and gift tax planning for which settled law is essential. In no area of personal affairs subject to the federal tax laws is uncertainty more disruptive than in connection with the taxability of voluntary and irrevocable decisions regarding the disposition of property. This Court has recognized that citizens are entitled to know what rules govern the tax consequences of such decisions, and to know that those rules will not be subject to retroactive revision or change. *See, e.g., Welch v. Henry,* 305 U.S. 134, 147-48 (1938). The conflict between the *Irvine* and the *Ordway* decisions has undermined this principle, and the Petition for Certiorari should be granted to resolve it.

The importance of certainty has been made plain by Congress itself in the very area of disclaimers. Congress amended the gift tax provisions in 1976 to eliminate the possibility that the taxability of disclaimers would vary as a function of geographical happenstance, and to impose new, objective standards governing the time within which disclaimers must be made. *See* 26 U.S.C. § 2518 (1976). The express purpose of the change, long recommended by professional study groups, was to assure "uniform treatment" of disclaimers, enabling taxpayers to decide whether or not to disclaim based upon a reliable understanding as to such action's tax consequences, and to know what would be required for a disclaimer to be effective for federal gift tax purposes. *See* H.R. Rep. No. 94-1380, 94th Cong., 2d Sess. 66-67 & n.5 (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 3356, 3420-21 & n.5.

The conflict between the *Irvine* and the *Ordway* decisions generates precisely such uncertainty, frustrating taxpayers in their legitimate efforts to place their personal affairs in order and making the taxation of estate and

gift tax planning subject to arbitrary factors of geography and date. Pet. 21. In this very case, Mr. Ordway and Mrs. Irvine made "virtually identical" disclaimers of the remainder interests passing to them from the same transfer in trust. Pet. App. 17a. Both disclaimers indeed were validly made under Minnesota law. *See* Pet. App. 31a; *Ordway*, 908 F.2d at 895. Yet one but not the other has been held to be a taxable gift, the sole product of Mr. Ordways' decision made after his disclaimer to move his residence from Minnesota to Florida. Surely, significant estate planning decisions and their gift tax consequences should not turn on one's ability to relocate or one's misfortune in having done so. Such inequity in the application of the tax laws to similarly situated taxpayers long has been held to implicate fundamental federal concerns, *cf. United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970) (arbitrary differences in tax legislation violate Due Process Clause); *United States v. Kaiser*, 363 U.S. 299, 308-09 (1960) (Frankfurter, J., concurring) (same), and the Petition for Certiorari should be granted to eliminate that inequity.

2. Resolution of this case also will involve constitutional questions of broad applicability—not only of disclaimers and matters of trust administration and lifetime transfers, but also of the constitutional limitations on Congress's power generally to impose retroactive gift taxes. *Irvine* and *Ordway* differ fundamentally as to whether the settled expectations of donors will be honored and held safe from the retroactive effect of subsequent legislation. *Irvine* would prohibit a donor's intentions from being frustrated by subsequently-enacted and unanticipated gift tax legislation; *Ordway* permits it. The conflict is one of longstanding and constitutional dimension.

The constitutional principles limiting gift taxation were laid out in the early decades of this century, responding to the first congressional efforts to impose estate and gift

taxation. *See Lewellyn v. Frick*, 268 U.S. 238, 251-52 (1925); *Blodgett v. Holden*, 275 U.S. 142, 147 (1927), *modified*, 276 U.S. 594 (1928); *Untermyer v. Anderson*, 276 U.S. 440, 445 (1928). This Court in *Blodgett* and *Untermyer* twice struck down efforts to impose a gift tax, holding them to be retroactive and therefore violative of the Due Process Clause. These decisions recognized the importance of donors' settled expectations: donors are entitled to know the tax consequences of their irrevocable decisions, and should be confident that subsequent legislative changes will not subject those decisions to retroactive and unanticipated revisions. Congress responded in 1932 by establishing a gift tax which specifically provided that "[t]he tax shall not apply to a transfer made on or before the date of enactment of this act [June 6, 1932]." Revenue Act of 1932, § 501(b), 42 Stat. 169 (1932). *See also United States v. Darusmont*, 449 U.S. 292, 299 (1981).

The importance of settled expectation is visible as well in Congress's express decision to make the 1976 changes in the disclaimer law prospective only—defining prospectivity in terms of the date of the transfer creating the interest in property disclaimed. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. 1896 (1976). In so doing, Congress honored the intentions of donors and settlors who long before had launched transfers in reliance on then-existing law, and who no longer had the ability to reorder their affairs to accommodate subsequent gift tax law changes. Congress amended the disclaimer provisions again in 1981, and again made the changes prospective: applicable solely to disclaimers of property interests created in transfers occurring after the effective date of the legislation. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 426(b), 95 Stat. 318 (1981).

This interpretation of Congress's solicitude toward the settled expectations of settlors and donors is widely held [3] and reflects the common sense notion that a donor can only rely on gift tax laws in existence and operative when he or she irretrievably parts with property in pursuit of legitimate efforts to place his or her personal affairs in order. Pet. 21. It recognizes the importance of estate and gift tax planning to many citizens, and the impropriety of subjecting those long-range planning decisions to unanticipated taxes that may rob the irrevocable decisions made in that context of any purpose. Finally, it accepts the legal effect and practical consequence of a disclaimer and squarely addresses the issue of retroactivity in this context by rejecting the taxation of pre-existing interests under subsequently-enacted rules.

Petitioner urges that the Court focus on the date when the disclaimer was made: "It is Mrs. Irvine's 1979 disclaimer, not her grandfather's 1917 transfer into trust, to which the gift tax applies." Pet. 14. That is not how disclaimers are analyzed for determining retroactivity, however. Only one transfer occurs on the valid disclaimer of a property interest—the transfer from the original settlor to his or her designated taker-in-default; for property law purposes, a disclaimer is a refusal to accept property *ab initio*. Austin W. Scott, *Trusts* § 36.1 (3d ed. 1967). Thus, only the date *of a transfer into trust* is relevant for determining whether an unconstitutionally retroactive gift tax has been imposed on a disclaimer, as Congress twice has expressly recognized. See p. 5, *supra*.

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[3] "Statutory language is . . . construed as inapplicable to transfers that were launched before the provision in question was enacted, even though the transfer was completed by a post-enactment event . . . . and Congress has often prescribed grandfather clauses or delayed effective dates for statutory innovations that arguably would otherwise fairly destroy settled expectations." 5 Bittker, *Federal Taxation of Income, Estates & Gifts* 120-28 (1984).

Whether or not Congress's decades-old view as to the constitutional limit of its power to impose gift taxes is correct has squarely been placed in contention by the different rules of *Ordway* and *Irvine*. To the extent Congress continues to amend the gift tax provisions in keeping with its view of the constitutional prohibition against retroactivity—as it has since 1932—resolution of the conflict between *Irvine* and *Ordway* will significantly affect the course of future tax legislation.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfuly submitted,

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